Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

PATRICIA SCANLON,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The Georgia Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The State of Georgia by statute (O.C.G.A. § 40-5-55) provides for the administration of "chemical tests" for drivers who are reasonably believed to be under the influence of alcohol. O.C.G.A. § 40-6-391(a)(4) further provides that the arresting law enforcement officer shall advise the driver of his implied consent rights prior to requesting the chemical tests. Such advising of rights concludes with the question: "Will you submit to a (blood, breath or urine) test?" In order to admit the test results at trial it is necessary to show the subject's positive response to that question.

In this case it is undisputed that Petitioner was in custody at the time she replied positively to the question above and it is further undisputed that no *Miranda* warning was given. The question presented is, therefore:

Under the facts of this case was Petitioner denied the rights granted to her pursuant to the Fifth and Fourteenth Amendments of the United States Constitution as set forth in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) when her response to a custodial interrogation was introduced into evidence and thus used against her.

PARTIES TO THE PROCEEDING

Patricia Scanlon (*Petitioner* in this Court)

State of Georgia (*Respondent* in this Court)

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PETITION FOR WRIT OF CERTIORARI

Patricia Scanlon respectfully petitions for a Writ of Certiorari to review the Judgment of the Georgia Court of Appeals and as to which Certiorari was denied by the Supreme Court of Georgia, the Georgia Court of last resort. The Georgia Court of Appeals erroneously determined that Petitioner had not been denied her right against self-incrimination under the United States Constitution when her response to a custodial interrogation under Georgia's DUI chemical test procedure was admitted at trial without a showing that she had been advised of and waived her rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

OPINIONS BELOW

The opinion of the Georgia Court of Appeals is reported as *Scanlon v. State*, 237 Ga. App. 362, 514 S.E.2d 876 (1999) (Appendix A). The opinion of the Georgia Supreme Court denying Certiorari is reported as ___ Ga.___ (___) (Appendix B) and the decision of the Georgia Supreme Court denying rehearing of Petition for Writ of Certiorari is not reported (Appendix C).

JURISDICTION

Jurisdiction is based upon denial of rights protected by the Fifth and Fourteenth Amendments to the United States Constitution. The Georgia Court of Appeals issued its decision on March 17, 1999. The Georgia Supreme

Court denied *Petitioner's Petition for Writ of Certiorari* on July 2, 1999. *Petitioner* properly submitted a Motion for Reconsideration to the Georgia Supreme Court. This Petition is timely filed within ninety days of the Georgia Supreme Court's denial of *Petitioner's* Motion For Rehearing on July 30, 1999.

STATUTORY PROVISIONS INVOLVED

O.C.G.A. § 40-5-55 provides:

(a) The State of Georgia considers that the persons who are under the influence of alcohol or drugs while operating a motor vehicle or who have a blood alcohol concentration of 0.10 grams or more at any time within three hours after operating a motor vehicle from alcohol consumed before such driving or actual physical control ended or who have any amount of marijuana or any controlled substance without prescription present in their blood or urine, without regard to the presence of alcohol, while operating a motor vehicle constitute a direct and immediate threat to the welfare and safety of the general public. Therefore, any person who operates a motor vehicle upon the highways or elsewhere throughout this state shall be deemed to have given consent, subject to Code Section 40-6-392, to a chemical test or tests of his or her blood, breath, urine, or other bodily substances for the purpose of determining the presence of alcohol or any other drug, if arrested for any offense arising out of acts alleged to have been committed in violation of Code Section 40-6-391 or if such person is involved in any traffic accident resulting in serious injuries or fatalities.

The test or tests shall be administered at the request of a law enforcement officer having reasonable grounds to believe that the person has been driving or was in actual physical control of a moving motor vehicle upon the highways or elsewhere throughout this state in violation of Code Section 40-6-391. The test or tests shall be administered as soon as possible to any person who operates a motor vehicle upon the highways or elsewhere throughout this state who is involved in any traffic accident resulting in serious injuries or fatalities. **Subject to Code Section 40-6-392, the requesting law enforcement officer shall designate which of the test or tests shall be administered,** provided a blood test with drug screen may be administered to any person operating a motor vehicle involved in a traffic accident resulting in serious injuries or fatalities.

(b) Any person who is dead, unconscious, or otherwise in a condition rendering such person incapable of refusal shall be deemed not to have withdrawn the consent provided by subsection (a) of this Code section, and the test or tests may be administered, subject to Code Section 40-6-392.

(c) As used in this Code section, the term "traffic accident resulting in serious injuries or fatalities" means any motor vehicle accident in which a person was killed or in which one or more persons suffered a fractured bone, severe burns, disfigurement, dismemberment, partial or total loss of sight or hearing, or loss of consciousness. **(Emphasis added)**

O.C.G.A. § 40-6-392 provides:

(a) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person in violation of Code Section 40-6-391, evidence of the amount of alcohol or drug in a person's blood, urine, breath, or other bodily substance at the alleged time, as determined by a chemical analysis of the person's blood, urine, breath, or other bodily substance shall be admissible. Where such a chemical test is made, the following provisions shall apply:

(1) (A) Chemical analysis of the person's blood, urine, breath, or other bodily substance, to be considered valid under this Code section, shall have been performed according to methods approved by the Division of Forensic Sciences of the Georgia Bureau of Investigation on a machine which was operated with all its electronic and operating components prescribed by its manufacturer properly attached and in good working order and by an individual possessing a valid permit issued by the Division of Forensic Sciences for this purpose. The Division of Forensic Sciences of the Georgia Bureau of Investigation shall approve satisfactory techniques or methods to ascertain the qualifications and competence of individuals to conduct analyses and to issue permits, along with requirements for properly operating and maintaining any testing instruments, and to issue certificates certifying that instruments have met those requirements, which certificates and permits shall be subject to termination or revocation at the discretion of the Division of Forensic Sciences.

(B) In all cases where the arrest is made on or after January 1, 1995, and the state selects breath testing, two sequential breath samples shall be requested for the testing of alcohol concentration. For either or both of these sequential samples to be admissible in the state's or plaintiff's case-in-chief, the readings shall not differ from each other by an alcohol concentration of greater than 0.020 grams and the lower of the two results shall be determinative for accusation and indictment purposes and administrative license suspension purposes. No more than two sequential series of a total of two adequate breath samples each shall be requested by the state; provided, however, that after an initial test in which the instrument indicates an adequate breath sample was given for analysis, any subsequent refusal to give additional breath samples shall not be construed as a refusal for purposes of suspension of a driver's license under Code Sections 40-5-55 and 40-5-67.1. Notwithstanding the above, a refusal to give an adequate sample or samples on any subsequent breath, blood, urine, or other bodily substance test shall not affect the admissibility of the results of any prior samples. An adequate breath sample shall mean a breath sample sufficient to cause the breath-testing instrument to produce a printed alcohol concentration analysis.

(2) When a person shall undergo a chemical test at the request of a law enforcement officer, only a physician, registered nurse, laboratory technician, emergency medical technician, or other qualified person may withdraw blood for the purpose of determining the alcoholic content therein, provided that this limitation shall not apply to the taking of breath or urine specimens. No physician,

registered nurse, or other qualified person or employer thereof shall incur any civil or criminal liability as a result of the medically proper obtaining of such blood specimens when requested in writing by a law enforcement officer;

(3) The person tested may have a physician or a qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of a law enforcement officer. The justifiable failure or inability to obtain an additional test shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer; and

(4) Upon the request of the person who shall submit to a chemical test or tests at the request of a law enforcement officer, full information concerning the test or tests shall be made available to him or his attorney. **The arresting officer at the time of arrest shall advise the person arrested of his rights to a chemical test or tests according to this Code section.**

(b) Except as provided in subsection (c) of this Code section, upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person in violation of Code Section 40-6-391, the amount of alcohol in the person's blood at the time alleged, as shown by chemical analysis of the person's blood, urine, breath, or other bodily substance, shall give rise to the following presumptions:

(1) If there was at that time an alcohol concentration of 0.05 grams or less, it shall be presumed that the person was not under the influence of alcohol, as prohibited by

paragraphs (1), (2), and (4) of subsection (a) of Code Section 40-6-391;

(2) If there was at that time an alcohol concentration in excess of 0.05 grams but less than 0.08 grams, such fact shall not give rise to any presumption that the person was or was not under the influence of alcohol, as prohibited by paragraphs (1), (2), and (4) of subsection (a) of Code Section 40-6-391, but such fact may be considered with other competent evidence in determining whether the person was under the influence of alcohol, as prohibited by paragraphs (1), (2), and (4) of subsection (a) of Code Section 40-6-391;

(3) If there was at that time an alcohol concentration of 0.08 grams or more, it shall be presumed that the person was under the influence of alcohol, as prohibited by paragraphs (1), (2), and (4) of subsection (a) of Code Section 40-6-391; and

(4) If there was at that time or within three hours after driving or being in actual physical control of a moving vehicle from alcohol consumed before such driving or being in actual physical control ended an alcohol concentration of 0.10 or more grams, the person shall be in violation of paragraph (5) of subsection (a) of Code Section 40-6-391.

(c)(1) In any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person in violation of subsection (I) of Code Section 40-6-391, if there was at that time or within three hours after driving or being in actual physical control of a moving vehicle from alcohol consumed before such driving or being in actual physical control ended an alcohol

concentration of 0.04 grams or more in the person's blood, breath, or urine, the person shall be in violation of subsection (I) of Code Section 40-6-391.

(2) In any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person in violation of subsection (k) of Code Section 40-6-391, if there was at that time or within three hours after driving or being in actual physical control of a moving vehicle from alcohol consumed before such driving or being in actual physical control ended an alcohol concentration of 0.02 grams or more in the person's blood, breath, or urine, the person shall be in violation of subsection (k) of Code Section 40-6-391.

(d) In any criminal trial, the refusal of the defendant to permit a chemical analysis to be made of his blood, breath, urine, or other bodily substance at the time of his arrest shall be admissible in evidence against him.

(e) A certification by the office of the Secretary of State or by the Department of Human Resources that a person was a licensed or certified physician, physician's assistant, registered nurse, practical nurse, medical technologist, medical laboratory technician, or phlebotomist at the time the blood was drawn shall be admissible into evidence for the purpose of establishing that such person was qualified to draw blood as required by this Code section.

(f) Each time an approved breath-testing instrument is inspected, the inspector shall prepare a certificate which shall be signed under oath by the inspector and which shall include the following language:

"This breath-testing instrument (serial no. ___) was thoroughly inspected, tested, and standardized by the undersigned on (date ___) and all of its electronic and operating components prescribed by its manufacturer are properly attached and are in good working order."

When properly prepared and executed, as prescribed in this subsection, the certificate shall, notwithstanding any other provision of law, be self-authenticating, shall be admissible in any court of law, and shall satisfy the pertinent requirements of paragraph (1) of subsection (a) of this Code section and subparagraph (g)(2)(F) of Code Section 40-5-67.1. **(Emphasis added)**

STATEMENT OF THE CASE

A. Background

Petitioner, Patricia Scanlon, was convicted in the State Court of Forsyth County, Georgia of the misdemeanor offense of Driving Under the Influence[1] based in part upon the admission of the results of a "chemical test" (Intoxilyzer 5000 breath test).

B. The Proceedings

This appeal is from the State Court of Forsyth County following a verdict of Guilty in a jury trial. Petitioner was accused by accusation by the Solicitor General of Forsyth County and charged with the offenses of Driving under

[1] O.C.G.A. § 40-6-391.

the Influence, Failure to Maintain Lane and Failure to Maintain Minimum Speed, all misdemeanor offenses.

The case proceeded to jury trial on, Wednesday, July 22, 1998. On Motion Petitioner was acquitted on Counts II and III (Failure to Maintain lane and Failure to Maintain Minimum Speed). Petitioner was convicted on Friday, July 24, 1998 and thereafter was sentenced to 12 months to serve provided that all but twenty-four hours would be served on probation. Petitioner thereafter filed her Notice of Appeal to the Georgia Court of Appeals.

Facts presented in the State's case and relevant to the question presented show the following:

On the afternoon of October 10, 1997 Petitioner clocked out of her place of employment at 5:21 p.m. and took approximately four minutes to leave her office and to walk to the front door of the store. Petitioner then left the store and walked to the middle of the parking lot where her vehicle was parked and placed her bag and personal things inside the car and walked across the parking lot to a restaurant where she had a single glass of wine. She stayed there for approximately fifteen minutes and paid for her glass of wine and left. Petitioner then left the parking lot and made a right-hand turn and made another right-hand turn and proceeded south on Georgia Highway 400. Petitioner testified that she was driving between 45 and 50 miles per hour. Traffic was heavy in both the northbound and southbound lanes. After several minutes she noticed a police patrol vehicle behind her and after several minutes that vehicle turned on its blue lights and pulled her over. The arresting officer stopped Petitioner at 15:07 (6:07 p.m.). A total of 46 minutes had

elapsed from the time that she clocked out of her place of employment to the time that she was stopped on the side of the road.

The arresting officer testified and is not disputed that he next asked Petitioner to perform various field sobriety tests. Then based upon his opinion of her performance of the field sobriety tests, Petitioner was told by the arresting officer that she was under arrest for driving under the influence. Petitioner was then handcuffed and placed in the back of the patrol car. The arresting officer testified that he then had a few other details to take care of including securing Petitioner's car. The arresting officer then called for a tow truck and the arresting officer then read Petitioner her implied consent rights pursuant to O.C.G.A. §§ 40-5-55 and 40-6-392.

It is undisputed that Petitioner was not read any *Miranda*[2] rights at any time.

It is also undisputed that Petitioner agreed to submit to the requested "chemical test" and that the State introduced the results of that "chemical test" (Intoxilyzer 5000) at trial as evidence against Petitioner.

The Georgia Court of Appeals issued its decision on March 17, 1999. The Georgia Supreme Court denied *Petitioner's Petition for Writ of Certiorari* on July 2, 1999. *Petitioner* properly submitted a Motion for Reconsideration to the Georgia Supreme Court. This Petition is timely filed

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[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

within ninety days of the Georgia Supreme Court's denial of *Petitioner's* Motion For rehearing on July 30, 1999.

REASONS FOR GRANTING THE PETITION

This case presents an example of the statutory conflict between Georgia statutory provisions and the custodial interrogation requirements under the United States Constitution and prior decisions of this court.

The issues set forth herein are of broad importance in an era of heightened consciousness of Driving Under the Influence offenses contrasted against personal liberties. Specific guidance is necessary to preserve the balance between vigorous prosecution and the protection of individual constitutional rights.

A review of existing law and principles involved will illustrate the necessity of providing such guidance and protection.

As set forth in the Facts above, it is undisputed that Petitioner was stopped by a law enforcement officer who then asked her to perform field sobriety tests and who then told her that she was under arrest for the offense of Driving Under the Influence. She was handcuffed and placed in the back seat of the patrol car. Only after that point was she advised of her implied consent rights. The Georgia Court of Appeals agreed that she was in custody at that point.

After Petitioner was in custody she was read her implied consent rights and was then asked whether she would consent to the state administered chemical test.

She replied that she would submit and that statement and the resulting analysis was introduced by the state as evidence against Petitioner in the trial of the case. It is undisputed that Petitioner was not given *Miranda* rights at any time.

Petitioner brought her challenge below to the admissibility of the test results on both Georgia and Federal constitutional grounds as well as under Georgia statutory law. This Petition rests only upon Federal constitutional grounds.

The Georgia Supreme Court in a unanimous opinion on March 19, 1998 said that a *Miranda* warning must precede field sobriety tests if the Defendant is "in custody" at the time. *Price v. State*, 269 Ga. 222, 224-225, 498 S.E.2d 262 (1998).

The Georgia Court of Appeals has on prior occasions reiterated the proposition that *Miranda* rights attach once an individual is in custody and that *Miranda* rights attach to field sobriety tests if the individual is "in custody". See, *Turner v. State*, 233 Ga. App. 413, 504 S.E.2d 229 (1998), and *Sisson v. State*, 232 Ga. App. 61, 499 S.E.2d 422 (1998). The Georgia Court of Appeals has also addressed the proposition of *Miranda* rights in the context of implied consent in a case involving a "refusal" to submit to a "chemical test". On January 14, 1998 in *State v. Warmack*, 230 Ga. App. 157, 495 S.E.2d 632 (1998), the Georgia Court of Appeals found that a refusal to submit to a chemical test was inadmissible since the Petitioner was "in custody" and *Miranda* warnings had not been given. Graphically, the typical DUI case can be illustrated as follows:

TYPICAL DUI CHRONOLOGY

The typical DUI case has the following constant events. First, there is the "stop" by the police officer, followed by administration of field sobriety test. The suspect is then given implied consent rights to which they either refuse or consent. (Under Georgia law either a consent or a refusal is admissible). The suspect is then taken to jail.

The variable in this equation for our purposes is the time at which the suspect is determined to be "in custody".

STOP	FIELD SOBRIETY	IMPLIED CONSENT (Refusal/Consent)	JAIL
1.	2.	3.	4.

In *Price* "custody" occurred prior to event 2. (Field Sobriety) and *Miranda* should be applied to all subsequent events.

In *Warmack* "custody" occurred prior to event 3. (Implied Consent) and *Miranda* thus should be applied to all subsequent events – "refusal" in that case.

In the instant case, it is undisputed that Petitioner was in custody and the only difference is that here Petitioner consented rather than refused. *Miranda* must apply, as in *Warmack* and *Price*, because Petitioner was in custody, questioned, gave evidence contrary to her interests and the state used it against her.

The Fifth Amendment of the United States Constitution specifies that no person shall be compelled in a

criminal case to be a witness against himself. In *Miranda*, this Court formulated procedural safeguards to ensure that the inherently compelling nature of an in-custody interrogation by the police will not undermine the suspect's will to resist and force him to speak "where he would not otherwise do so freely." *Miranda*, 384 U.S. at 467.

Based upon the above reasoning and the foregoing authority Petitioner was entitled to be advised of her *Miranda* rights and the failure of the State to do so requires reversal of Petitioner's conviction.

CONCLUSION

For the above and forgoing reasons the writ of certiorari should be granted.

Respectfully submitted,

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October 28, 1999

APPENDIX A

SCANLON

vs.

THE STATE.

A99A0399.

COURT OF APPEALS OF GEORGIA

237 Ga. App. 362, 514 S.E.2d 876, 1999 Ga. App. LEXIS 386
March 17, 1999, Decided

D.U.I. Forsyth State Court. Before Judge Bagley.

Reconsideration Denied March 30, 1999. Certiorari Applied for.

COUNSEL

Banks, Stubbs & Neville, Rafe Banks III, for appellant.

Leslie C. Abernathy, Solicitor, Laura A. Janssen, Assistant Solicitor, for appellee.

JUDGES

JOHNSON, Chief Judge. McMurray, P.J., and Ruffin, J., concur.

JOHNSON, Chief Judge.

Patricia Scanlon was charged with driving under the influence of alcohol to the extent that it was less safe for her to do so, failure to maintain lane, and failure to maintain minimum speed. The trial court granted her motion for a directed verdict of acquittal as to the charges

of failure to maintain lane and failure to maintain minimum speed. A jury found her guilty of the DUI charge. She appeals from the judgment of conviction entered on the verdict.

Viewed in a light most favorable to the verdict, the evidence shows: Scanlon was driving her car on Georgia 400. A police officer stopped her after he saw her car moving slowly, causing traffic congestion, and weaving in its lane. Based on her physical appearance and the manner in which she performed various field sobriety tests, the officer arrested Scanlon for DUI. The officer placed handcuffs on Scanlon, put her in the rear seat of the patrol car, and called a tow truck. Although Scanlon had not been advised of her Miranda rights, the officer read an implied consent notice to her. Scanlon verbally consented to take a chemical breath test and was taken to the local detention center where she was tested on an Intoxilyzer 5000.

Before trial, Scanlon moved to suppress or exclude the breath test results and evidence that she consented to the breath test. Scanlon asserted that admission of this evidence would violate her federal and state privilege against self-incrimination, her state constitutional right of due process, and her statutory right against self-incrimination because she was never advised of her Miranda rights after her arrest. After an evidentiary hearing, the trial court ruled that the breath test results and evidence that Scanlon consented to the breath test were admissible. Scanlon asserts this ruling is error. We disagree and affirm.

1. The privilege against self-incrimination protects an accused only from being compelled to testify against herself, or otherwise to provide the state with evidence of a testimonial or communicative nature. *United States v. Wade*, 388 U.S. 218, 221 (87 S. Ct. 1926, 18 L. Ed. 2d 1149) (1967). In order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. *Pennsylvania v. Muniz*, 496 U.S. 582, 594 (110 S. Ct. 2638, 110 L. Ed. 2d 528) (1990). When asked if she would take a chemical breath test, Scanlon replied "yes." This verbal response was neither testimonial nor communicative in nature; it was neutral in its effect and thus, not protected by the privilege against self-incrimination. *See id.* at 593-597.

Scanlon's understanding of the Intoxilyzer test and her consent to take it were not prompted by an interrogation within the meaning of Miranda. *See id.* at 600-601. The officer questioned Scanlon only as to whether she understood his instructions and wished to submit to the test. "These limited and focused inquiries were necessarily attendant to the legitimate police procedure" for giving implied consent notice, "and were not likely to be perceived as calling for any incriminating response." (Citation and punctuation omitted.) *Id.* at 605.

Thus, the absence of Miranda warnings does not require suppression of Scanlon's consent to the breath test under federal law. *Id.* at 604-605.

2. Admission of the breath test results did not violate Scanlon's Fifth and Fourteenth Amendment rights even though she was in custody and no Miranda warnings were given. *See Price v. State*, 269 Ga. 222, 225(3), n. 13

(498 S.E.2d 262) (1998); *Morrissette v. State*, 229 Ga. App. 420, 421-422(1)(a) (494 S.E.2d 8) (1997). The results obtained from a chemical breath test, like the results obtained from a sobriety test or a blood test, are not evidence of a testimonial or communicative nature. *See Schmerber v. California*, 384 U.S. 757, 765 (86 S. Ct. 1826, 16 L. Ed. 2d 908) (1966); *see also United States v. Wade, supra* 388 U.S. 218, 221-223; *Green v. State*, 194 Ga. App. 343, 344(3) (390 S.E.2d 285) (1990). Scanlon's testimonial capacities were not implicated by the chemical breath test. Her participation in the breath test, except as a donor, was irrelevant to the results of the test, which depended solely on chemical analysis. *See Schmerber, supra* at 765.

3. Scanlon claims that it violated OCGA § 24-9-20 to admit in evidence her consent to a chemical breath test and the results of that test. We find this claim to be without merit.

OCGA § 24-9-20(a) provides: "No person who is charged in any criminal proceeding with the commission of any indictable offense or any offense punishable on summary conviction shall be compellable to give evidence for or against himself." OCGA § 24-9-20 is not applicable here because although Scanlon was in custody, she was not charged in a criminal proceeding when she consented to take and took the chemical breath test. *See Montgomery v. State*, 174 Ga. App. 95, 96(1) (329 S.E.2d 166) (1985); *see also Keenan v. State*, 263 Ga. 569, 572(2) (436 S.E.2d 475) (1993).

4. Scanlon contends that the Supreme Court's holding in *Price v. State, supra* at 224(3), requires that her conviction be reversed. We disagree.

The Supreme Court concluded in *Price* that under Georgia law, Miranda warnings must precede a request to perform a field sobriety test if the suspect is in custody. *See id.* at 225(3); *accord Turner v. State*, 233 Ga. App. 413, 416(1)(b) (504 S.E.2d 229) (1998); *State v. O'Donnell*, 225 Ga. App. 502, 504(2) (484 S.E.2d 313) (1997); *State v. Pastorini*, 222 Ga. App. 316, 317-318(1) (474 S.E.2d 122) (1996).

The cases cited by Scanlon involve field sobriety tests. This court is aware that police officers frequently rely upon field sobriety tests to bolster their opinions regarding a suspect's state of sobriety. Often the principal evidence upon which an officer relies when making a probable cause determination in a DUI case is the result of a suspect's field sobriety test. During field sobriety testing, an officer gives a suspect various instructions as to how and when to perform the tests and verbal response tests are also frequently used. How accurately a suspect follows testing instructions and performs the tests is generally admissible at trial.

A chemical breath test does not require the same sort of extensive verbal and physical responses, and a chemical test is usually performed after the police have already established probable cause by other admissible evidence.

Unlike cases involving field sobriety testing, this court has never held that Miranda warnings must precede the giving of an implied consent notice to a DUI suspect in police custody. Our state constitution does not

prohibit the taking of a blood, urine, breath, or other bodily substance sample from a defendant without her consent, provided the taking of the sample is done under constitutionally acceptable conditions. *See Fantasia v. State*, 268 Ga. 512, 514(2) (491 S.E.2d 318) (1997); *Keenan*, 263 Ga. at 570; *State v. Leviner*, 213 Ga. App. 99, 100(2) (443 S.E.2d 688) (1994). In the case of *Lankford v. State*, 204 Ga. App. 405, 406(1) (419 S.E.2d 498) (1992), this Court held that a refusal to take a blood-alcohol test was not an act coerced by the officer and thus the refusal was not protected by the privilege against self-incrimination. *See also Buchnowski v. State*, 233 Ga. App. 766, 768(2) (505 S.E.2d 263) (1998). We find the holding in *Lankford* to be equally applicable to cases where the suspect consents to chemical testing.

Under the Georgia implied consent statutes, Scanlon was given a genuine choice whether to consent to a chemical breath test; she was not coerced or compelled to consent to chemical testing. Thus, even though she was not given Miranda warnings before being given the implied consent notice, her state constitutional right of due process and privilege against self-incrimination were not violated. *Compare State v. Mack*, 207 Ga. App. 287 (427 S.E.2d 615) (1993); *see Fantasia, supra; Keenan, supra; State v. Highsmith*, 190 Ga. App. 838-839 (380 S.E.2d 272) (1989). In view of the statutory protections provided by our implied consent statutes, we decline to extend the holding in *Price*, supra, and the similar cases of this Court, so as to require that a Miranda warning precede a request to submit to a chemical breath test when a suspect is in police custody.

5. Scanlon contends that the trial court erred in denying her request that the trial court give a charge to the jury that included an explanation of the requirements for and contents of Miranda warnings, the state's burden to prove that Miranda warnings were properly given and thereafter waived, the voluntariness of a defendant's pre-trial statement, and the conditions which must be met before a defendant's post-arrest statement could be considered by the jury. We find no error.

First, as determined in Division 1, Miranda warnings were not required before Scanlon was given an implied consent notice and the chemical breath test was performed. It is not error to decline to give a charge not reasonably raised by the evidence. *See Lance v. State*, 191 Ga. App. 701, 703(2) (382 S.E.2d 726) (1989).

Second, although correct as an abstract principle of law, the requested charge was not adequately adjusted to the evidence. Thus, even if the issue had been reasonably raised by the evidence, the trial court did not err in refusing to give the requested charge. *See Morrissette v. State*, 229 Ga. App. at 425(3)(a); *Haney v. State*, 234 Ga. App. 214, 217(2) (507 S.E.2d 18) (1998).

Judgment affirmed. McMurray, P. J., and Ruffin, J., concur.

DISPOSITION

Judgment affirmed.

APPENDIX B

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: July 02, 1999

Rafe Banks, III
BANKS & STUBBS
Suite 200, Forsyth Professional Bldg.
110 Old Buford Road
Cumming GA 30040

Case No. S99C1042

PATRICIA SCANLON v. THE STATE

COURT OF APPEALS CASE NO. A99A0399

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sincerely,

Sherie M. Welch, Clerk

APPENDIX C

SUPREME COURT OF GEORGIA

Case No. S99C1042 Atlanta, July 30, 1999

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

PATRICIA SCANLON v. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sherie M. Welch, Clerk.

Supreme Court, U.S.
FILED
NOV 24 1999
CLERK

(2)

No. 99-745

In The

Supreme Court of the United States

PATRICIA SCANLON,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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QUESTION PRESENTED

Whether this Court should decline to grant certiorari to review the Georgia Appellate Court's precise application of this Court's clearly established precedents, and the lower court's conclusion that Petitioner's affirmative response to the arresting officer's "limited and focused inquiries . . . necessarily attendant to the legitimate police procedure" was "not prompted by an interrogation within the meaning of Miranda, and therefore the absence of Miranda warnings does not require suppression of [that statement] at trial."

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PART I.

STATEMENT OF THE CASE

Petitioner was convicted by a jury of one count of driving under the influence on July 24, 1998. Petitioner received a twelve-month sentence, with four days to be served in confinement and the balance to be probated. Petitioner's conviction and sentence were affirmed on direct appeal. *Scanlon v. State*, 237 Ga. App. 362, 514 S.E.2d 876 (1999). Petitioner's Motion for Reconsideration was denied by the Court of Appeals of Georgia on March 30, 1999. Petitioner applied for certiorari to the Supreme Court of Georgia, and the same was denied on July 2, 1999. Petitioner's Motion for Reconsideration was denied by the Supreme Court of Georgia on July 30, 1999. Petitioner now files this Petition for Writ of Certiorari.

PART II.

STATEMENT OF THE FACTS

Based on the record before it, the Court of Appeals of Georgia found that:

> [Petitioner] was driving her car on Georgia 400. A police officer stopped her after he saw her car moving slowly, causing traffic congestion, and weaving in its lane. Based on her physical appearance and the manner in which she performed various field sobriety tests, the officer arrested [Petitioner] for DUI. The officer placed handcuffs on [Petitioner], put her in the rear seat of the patrol car, and called a tow truck. Although [Petitioner] had not been advised of her *Miranda* rights, the officer read an implied

> consent notice to her. [Petitioner] verbally consented to take a chemical breath test and was taken to the local detention center where she was tested on an Intoxilyzer 5000.
>
> Before trial, [Petitioner] moved to suppress or exclude the breath test results and evidence that she consented to the breath test. [Petitioner] asserted that admission of this evidence would violate her federal and state privilege against self-incrimination, her state constitutional right of due process, and her statutory right against self-incrimination because she was never advised of her *Miranda* rights after her arrest. After an evidentiary hearing, the trial court ruled that the breath test results and evidence that [Petitioner] consented to the breath test were admissible.

Scanlon v. State, 237 Ga. App. 362, 514 S.E.2d 876 (1999).

PART III.

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW A QUESTION NOT PRESENTED BY THE FACTS OF PETITIONER'S CASE.

While Petitioner claims that her case "presents an example of the statutory conflict between Ga. Stat. provisions and the . . . prior decisions of this Court [Petition, p. 12]," even a cursory reading of the Court's relevant opinions, as were relied upon by the State Appellate Court below, demonstrates that no such conflict exists. In fact,

as is demonstrated below, Petitioner's case is fairly controlled by the clearly established precedents of this Court, and the Court below correctly applied such precedents.

Initially, it must be noted that the only authority of this Court cited by Petitioner is this Court's opinion in *Miranda v. Arizona*, 384 U.S. 436 (1966). While that opinion clearly delineates the responsibility of law enforcement officers to properly apprise those persons held in custody of their privilege against self-incrimination prior to interrogation, its citation by Petitioner in the case at bar begs the question of whether such authority is applicable to Petitioner given the facts of her case. A review of those facts, as set forth in the opinion of the Georgia Court of Appeals and outlined herein above, demonstrates that Petitioner's reliance upon *Miranda* is inapposite.

Petitioner was stopped in her car by a police officer for weaving over the roadway and for traveling below the posted minimum speed. After conducting several field sobriety tests on which Petitioner did poorly, the officer placed Petitioner under arrest and read her the statutorily required implied consent warning, which included the question as to whether she would submit to the state administered chemical test. Petitioner responded in the affirmative.

The Georgia Court of Appeals, in affirming Petitioner's conviction and sentence, properly identified and applied this Court's decision in *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), finding that Petitioner's "verbal response was neither testimonial nor communicative in nature; it was neutral in its effect and thus, not protected by the

privilege against self-incrimination." *Scanlon v. State*, 237 Ga. App. 362, 363, 514 S.E.2d 876, 878 (1999).

In *Muniz*, this Court held that "Miranda does not require suppression of the statements [the driver] made when asked to submit to a breathalyzer examination. . . . [The driver's] statements were not prompted by an interrogation within the meaning of Miranda, and therefore the absence of Miranda warnings does not require suppression of these statements at trial." *Muniz*, 496 U.S. at 604-05. That question was rather within that class of "limited and focused inquiries . . . necessarily attendant to the legitimate police procedure . . . and were not likely to be perceived as calling for any incriminating response." *Id.*, at 605 (cits. and internal punctuation omitted).

The only distinction that can be drawn between Petitioner's case and the factual scenario presented in *Muniz* is that in the case at bar Petitioner agreed to submit to the test, while in *Muniz* the driver refused. *Id.* Presently, the Petitioner urges granting the writ and reversal of the lower court's decision based upon the fact that her "statement" agreeing to take the state-designated chemical test was admitted at trial, without her having been "advised of her *Miranda* rights." Petition, p. 15. Petitioner nowhere addresses why her *agreeing* to take the breathalyzer test should be suppressed, when this Court has specifically held that a driver's *refusal* to submit is admissible. *Id. See also, South Dakota v. Neville*, 459 U.S. 553 (1983) (since submission to blood testing can be compelled, state's decision to permit refusal but comment upon refusal at trial does not violate privilege against self-incrimination).

Ultimately then, the writ must be denied because Petitioner has failed to address why this Court's clear precedents should not be applied to her case. That Petitioner has not even cited, much less addressed, the application of these precedents to her case belies her claims that she "was entitled to be advised of her *Miranda* rights and the failure of the State to do so requires reversal of Petitioner's conviction." Petition, p. 15. In fact, as the Georgia Court of Appeals recognized, this Court's clear precedents demonstrate that Petitioner's premise is unfounded. Thus, the writ should be denied.

II. THIS COURT SHOULD DENY THE WRIT AS PETITIONER'S RELIANCE ON *STATE V. WARMACK* AND *PRICE V. STATE* IS MISPLACED.

In her brief, Petitioner relies on *State v. Warmack*, 230 Ga. App. 157, 495 S.E.2d 632 (1998), and *Price v. State*, 269 Ga. 222, 498 S.E.2d 262 (1998), for the proposition that "*Miranda* must apply . . . because Petitioner was in custody, questioned, gave evidence contrary to her interests and the state used it against her." Petition, p. 14. Respondent, however, submits that *Miranda* does not apply to the instant case, and further, that Petitioner's reliance on these authorities is misplaced.

In *Warmack*, the defendant was stopped by a police officer after being suspected of driving under the influence. 230 Ga. App. at 157. After failing several field sobriety tests administered by the officer, the defendant was placed under arrest and was advised of his implied consent rights. *Id.* The officer administered the Intoxilyzer 5000 breath test which resulted in readings which

were inconsistent with the defendant's poor performance in the field sobriety tests. *Id.* Based on the inconsistency, the officer requested additional testing of the defendant's blood and urine. *Id.*

In holding that the officer had no authority to request additional tests of the defendant, the Georgia Appellate Court relied on O.C.G.A. § 40-5-67.1, which provides that "subject to Code Section 40-6-392, the requesting law enforcement officer shall designate which test shall be administered, provided that the officer shall require a breath test or a blood test and may require a urine test." The court determined that the "plain statutory language [of O.C.G.A. § 40-5-67.1] authorizes the requesting official to select a breath test and a urine test or a blood test and a urine test." *Id.* at 158. Thus, once the officer selects the type of test to be performed, the statute does not authorize the officer to require the defendant to submit to further testing. *Id.* Having determined that the officer was outside the scope of his statutory authority, the Georgia Appellate Court held that the "request to undergo further State testing must be preceded by *Miranda* warnings." *Id.* at 158-59.

Petitioner also relies on *Price v. State* for the proposition that "*Miranda* must apply." Petition, p. 14. In *Price*, the defendant submitted to a field sobriety test after being advised by a police officer that she was going to jail for driving under the influence. 269 Ga. at 225. The Georgia Appellate Court held that, under these circumstances, because the defendant was in custody, *Miranda* should have been given and that the evidence of the field sobriety test should have been suppressed under state law. *Id.* Importantly, however, the court held that because

field sobriety tests are not testimonial in nature, a federal constitutional challenge to the admissibility of such evidence would fail, as the prohibition contained in the United States Constitution applies only to evidence that is testimonial. *Id.* Thus, Petitioner's reliance upon *Price* is misplaced.

Petitioner, like the defendant in *Warmack,* was in custody at the time she was asked to submit to a chemical test. Unlike *Warmack,* however, the officer who arrested Petitioner requested her to submit to only one test rather than multiple tests. In so doing, the officer was within his statutory authority, pursuant to O.C.G.A. §§ 40-5-55 and 40-5-67.1, such that *Miranda* would not apply. Accordingly, Petitioner's reliance upon *Warmack* is misplaced.

In sum, the Georgia Appellate Court authorities relied upon in the instant petition fail to support Petitioner's assertion that her Fifth and Fourteenth Amendment rights were violated. As set forth above, Petitioner's consent to submit to the state's chemical breath test is not testimonial and thus, *Miranda* does not apply. Thus, the writ should be denied.

CONCLUSION

WHEREFORE, based on the foregoing, Respondent prays that this Court deny the instant Petition for Writ of Certiorari.

Respectfully submitted,

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